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No. 99249-5

SUPREME COURT OF THE STATE OF WASHINGTON

ANTONIA NYMAN,

Respondent,

v.

DAN HANLEY,

Appellants.

AMICUS CURIAE MEMORANDUM BRIEF ON BEHALF OF
LANDLORD AND TENANT ATTORNEY DREW MAZZEO

By:

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1. ISSUES OF CONCERN TO AMICUS CURIAE

First, the CDC moratorium does not apply to Washington State. Second, even if it did, it allows evictions based on the lease expiring and the owner occupying or selling the rental property. Last, holding the CDC moratorium preempted state law would be devastating to mom-and-pop landlords and tenants across this state years into future.

2. IDENTITY AND INTEREST OF AMICUS CURIAE DREW MAZZEO, LANDLORD AND TENANT ATTORNEY

Undersigned counsel is a prior small family business manager and current landlord and tenant attorney with hundreds of “mom-and-pop” landlord clients in the rural, less wealthy, counties across this state.

3. STATEMENT OF THE CASE

King County Superior Court ruled that “Governor Inslee’s moratorium on residential evictions is more restrictive than the CDC guidelines” and that “The CDC guidelines allow guidelines allow evictions where a party violates the terms of the lease.” (King County Order, dated November 19, 2020).

4. ARGUMENT

The CDC Moratorium Does Not Apply in Washington State, and Even If It Did the CDC Moratorium Does Not Prohibit Evictions Based on the Lease Term Ending and Owners Occupying or Selling the Rental Property.

“Congress may preempt state law in three basic manners: express

preemption, field preemption, and conflict preemption.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 265, 884 P.2d 592, 604 (1994) (citing *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 192-99, 849 P.2d 646 (1993), *aff’d*, 511 U.S. 700, 128 L. Ed. 2d 716, 114 S. Ct. 1900 (1994)). “Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.” *Id.*

“State laws are not superseded by federal law unless that is the *clear and manifest purpose* of Congress.” *Id.* (emphasis added). “A party arguing preemption must demonstrate either the ‘congressional intent to preempt state law’ or such a ‘direct and positive’ conflict that the federal and state acts cannot be reconciled or consistently stand together.” *Hous. Auth. of Everett v. Terry*, 114 Wn.2d 558, 565, 789 P.2d 745, 749 (1990).

This Court has repeatedly emphasized that there is a strong presumption against finding preemption of State law in an ambiguous case. *Progressive Animal Welfare Soc’y*, 125 Wn.2d at 265; *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054, 1068 (1993). For example, where federal law and state law

“parallel[]” each other but there still exist notable differences “in many areas”—the state law is not preempted. *Progressive Animal Welfare Soc’y.*, 125 Wn.2d at 266. The presumption against preemption is “even stronger with state regulation regarding matters of health and safety,” in which states have traditionally exercised their sovereignty. *Washington State Physicians Ins. Exch. & Ass’n v.*, 122 Wn.2d at 327.

Last, 42 CFR § 70.2 Measures in the Event of Inadequate Local Control, only allows the CDC to “take measures to prevent [the] spread of . . . diseases” if its Director “determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession.” 42 CFR § 70.2.

Here, first, as to applicability, the CDC order expressly states that “This Order *does not apply in any State*, local, territorial, or tribal area *with a moratorium on residential evictions* that provides the same or greater level of public-health protection than the requirements listed in this Order.” (CDC Order at 5, 14-15) (emphasis added). The CDC Order also states it is “subject to the limitations” under “Applicability Under 42 CFR 70.2.” (CDC Order at 7, 27).

Given that no Director of the CDC has determined that Governor

Inslee's Proclamations "are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession," the CDC Order does not apply to Washington State at all. In fact, Governor Inslee's Proclamation is the most health and safety protective, tenant friendly, COVID eviction moratorium order in the nation by a long shot:

- It goes so far as to intend to allow friends and family of lessee's to be protected from eviction; the CDC order does not.
- It bars the service of most eviction notices; the CDC order does bar service of any eviction notices whatsoever.
- It deems rental debt unenforceable; the CDC orders expressly states all rental debt is an enforceable debt.
- It deems rental charges for late payments unenforceable; the CDC orders expressly states all rental charges are an enforceable debt.
- It bars the raising of rent; the CDC order does not.
- It bars failure to pay evictions in totality; the CDC order only allows certain tenants to raise a defense that might prevent them from being evicted for failure to pay rent.
- It bars landlords from retaliating against tenants; the CDC order has no such prohibitions.

- It bars landlords from threatening eviction; the CDC order has no such provisions.
- It applies to commercial tenancies; the CDC order does not.
- It provides provisions for long-term care facilities; the CDC order does not.
- It does not provide for allowing evictions solely based on criminal activity; rather, it requires a “significant and immediate risk to the health, safety, or property of others created by the resident”; the CDC order allows eviction for *any* “criminal activity while on the premises.”
- It protects persons who are only a threat to themselves and no one else or property from eviction; the CDC order allows evictions based on self-harm if the self-harm is also criminal in nature.
- It protects persons with disabilities from eviction; the CDC order has no such language or provisions.

(Proclamation 20-19.5).

In other words, to argue that Governor Inslee’s Proclamation does not “provide the same or greater level of public-health protection than the

requirements listed” in the CDC Order—borders on the absurd.¹

Second, as to express preemption, the CDC Order does not expressly preempt Governor Inslee’s proclamation for the same reasons stated above as to why the CDC Order is not applicable in Washington State; Governor Inslee’s Proclamation provides the same or great protections and no language in the CDC Order can be read to imply preemption. Thus, the burden of overcoming the “strong presumption” against preemption, express or otherwise, cannot be met.

Third, as to field preemption, the CDC Order *ONLY provides a possible defense to failure pay evictions where the tenant has been impacted COVID, meets low-income thresholds, made best efforts to pay rent and get assistance to do so, AND will be left homeless if evicted*. We know this because the CDC order expressly states that “persons may . . . be evicted for reasons other than not paying rent or making a housing payment.” (CDC Order at 6, 34). If there was any doubt about this interpretation, the CDC Order goes on to state that “Nothing in this Order precludes evictions based on a tenant, lessee, or resident . . . (5) violating any other contractual

¹ Amicus notes that not only does the Governor Inslee’s proclamation “provide the same or greater level of public-health protection than the requirements listed” in the CDC Order, but that local jurisdictions are even more protective than either. *E.g.*, Chapter 5.82 of the City of Olympia Municipal Code (OMC 5.82.030.E.2.C); Chapter 14.09 of City of Seattle Municipal Code, Ordinance 126080 (SMC 14.09.026).

obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).” (CDC Order at 15-16). Simply put, the CDC Order has not taken over the field of eviction law in Washington State. These sentences—when read in the context of the rest of the CDC Order, and particularly the defensive affidavit tenants may provide to landlords—means that the CDC Order only applies in applicable jurisdictions (not including Washington State) to failure to pay evictions by providing a possible (qualified) defense to such evictions. Because Washington State is not an applicable jurisdiction and because the eviction at hand is for a reason other than failure to pay, the CDC Order does not occupy the field of eviction law applicable to this case.

Fourth, as to conflict preemption, Governor Inslee’s proclamation attempts to preserve its constitutionality² by expressly allowing evictions

² “The right to exclude others is an essential stick in the bundle of property rights.” *Excelsior Mortgage Equity Fund II, LLC v. Schroeder*, 171 Wn. App. 333, 344, 287 P.3d 21, 26 (2012); *City of Sunnyside v. Lopez*, 50 Wash.App. 786, 795 n. 7, 751 P.2d 313 (1988) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)); see also *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wash.2d 347, 364, 13 P.3d 183 (2000) (the right of unrestricted use, enjoyment, and disposal is a substantial part of property’s value (quoting *Ackerman v. Port of Seattle*, 55 Wash.2d 400, 409, 348 P.2d 664 (1960), abrogated on other grounds by *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wash.2d 6, 548 P.2d 1085 (1976))).

Regulatory takings may be “per se” or “partial.” *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 660–61, 451 P.3d 675, 683 (2019), cert. denied sub nom. *Chong Yim v. City of Seattle, Washington*, 140 S. Ct. 2675, 206 L. Ed. 2d 826 (2020). A per se regulatory taking is found where a regulation’s impact is necessarily so onerous that the regulation’s mere existence is, “from the landowner’s point of view, the equivalent of a physical appropriation.” *Id.*; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Takings can occur when regulations require an owner to suffer a permanent

based on an owner occupying the property as his or her own residence or selling the property. The CDC Order is carefully worded to not bar such evictions, for the same constitutional reasons. The pertinent point being that Governor Inslee's proclamation and the CDC Order do not conflict with each other; *the former expressly allows* evictions based on owner occupying the property or selling the property, and *the latter limits its protections against evictions to (possible) failure to pay defenses* that can be raised by

physical invasion of her property and when regulations completely deprive an owner of all economically beneficial use of her property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S. Ct. 2074, 2081, 161 L. Ed. 2d 876 (2005).

Additionally, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed.2d 631 (1978), provides that takings can occur under the individual factors enumerated within that case. *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), is illustrative. The Court held that flights above the claimant's land destroyed the present use of the land as a chicken farm, and therefore that constituted a "taking." *Causby* emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Id.*, 328 U.S., at 262–263, n. 7, 66 S.Ct., at 1066. *See also Griggs v. Allegheny County*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962) (overflights held a taking); *Portsmouth Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking). Notably, the 13th Amendment prohibits "involuntary servitude."

Here, *forcing* (under threat of committing a crime) small mom-and-pop landlords, often with only a single rental remaining to continue being rental managers when they do not want to be (and/or when retiring from all work) and *forcing* them (under threat of committing a crime) to continue renting property (all the while imposing statutory and common law duties and premise liabilities upon them) when they no longer wish to be landlords at all—by prohibiting them for selling or owner-occupying the rental property—would be involuntary servitude imposed by the State under the 13th Amendment. The State cannot single out landlords to become welfare instrumentalities without compensation, nor can it force them to work. Combined with the fact that tenants do not have to pay rent or any "charge related to a dwelling unit," prohibiting the selling or owner occupation of rental property would also be an uncompensated taking by the State. Such things are onerous on their face and utterly repulsive in a free society. To prevent such disturbing consequences, the Governor's proclamation (and the CDC Order for that matter) allow evictions for selling or owner occupying rental property.

affidavit by the tenant.

In sum, the CDC Order does not apply to Washington State and does not preempt the Governor's Proclamation.³ Even if it did—which it does

³ Amicus reserves argument regarding the constitutionality, or continued constitutionality, of the Proclamation itself. The United States Supreme Court has held that “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21, 18 L.Ed. 281, 295 (1866).³ The Supreme Court went on to hold that allowing the government to violate the constitution in an emergency leads to the most “pernicious consequences” that “was ever invented by the wit of man.” *Id.* The high court reasoned that constitutional provisions cannot be “suspended during any of the great exigencies of government.” *Id.*

The Constitution of the State of Washington imposes on the Governor the duty to see that the laws are faithfully executed. Const. art. 3, s 5. In pertinent part, RCW 43.06.220 states:

the governor after proclaiming a state of emergency and prior to terminating such, may, in areas described by the proclamation issue an order prohibit. . . .

(h) Such other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property, or public peace.

Further, under RCW 43.06.210, “the governor must terminate said state of emergency proclamation *when order has been restored in the area affected*.” (emphasis added).

Here, taking “Dashboard” statistics as correct on their face (leaving aside the definition of a case or the distinction of dying *from* COVID-19 versus dying *with* COVID-19), the chance of dying with COVID-19 in Washington State is minuscule as to the population in general. For those under 60 years old, and without co-morbidities, the chance of dying with COVID-19 is almost zero.

In other words, there is a strong argument that the governor's authority to issue and enforce proclamations has ceased and that it is the government mandates themselves—issued for months on end without any vote of the people and without any legislature action whatsoever—are the only things that are causing an emergency and problems in society. Certainly, if a president of the United States, Congress, and all state governor and legislative elections can take place—as they did months ago—and if courts, businesses, and schools can operate in person, there is no reason that democracy cannot be employed regarding COVID-19.

One could also certainly argue that separation of powers doctrine and check and balances,

not—the major term of a rental agreement that it allows eviction for is the breach of the term (*i.e.*, duration) of the lease. No lease provides for an indefinite term of residence.⁴ Prohibiting evictions based on the sale of the property or owner occupation would be unconstitutional and would be ruinous to mom-and-pop landlords, just trying to make ends meet or provide for their families. Contrary to Appellant’s arguments, prohibiting the sale of properties or owner occupation would both dramatically reduce the supply of rental units and drive up the rental rates for available units. This is because mom-and-pop landlords—many of which have not been paid in over a year⁵—are selling properties to make ends meet and to stay in business. They are owner occupying properties to save their businesses and families. Surely, allowing the sale of some units, and owner occupation of some units, to preserve the majority of housing and help prevent rental rate increases for everyone are reasons Governor Inslee’s eviction ban

makes this Court duty bound to both stand up to executive, *i.e.*, historically monarchical, overreach as well as legislative omission and complacency. The argument would continue that this Court should not pretend an emergency exists when facts on the ground demonstrate there is no disorder preventing the legislature from passing democratically made law. Further, that the governor cannot just unilaterally—like a dictator—issue proclamations out of thin air for months (and years?) on end. In such case, if the Proclamation is unenforceable, RCW 59.12.030(2)’s twenty-day notice period and/or non-emergency local ordinances would apply—since the CDC Order allows evictions for breaches such as holding over the term of the tenancy (*see above*).

⁴ Life estates are an ownership interest not a lease.

⁵ Where would anyone on this Court be, and what would his or her life be like, if he or she were not paid for twelve months?

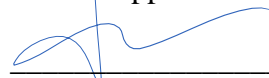
exceptions safeguard all tenants across this state.

5. CONCLUSION

For the above stated reasons, undersigned counsel respectfully request that this Court affirm the Superior Court.

Respectfully submitted this 13th day of March, 2021,

Harbor Appeals and Law, PLLC



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